UNITED STATES OF AMERICA	)	**PROSECUTION RESPONSE TO DEFENSE MOTION TO DISMISS FOR LACK OF JURISDICTION: SYSTEM WILL NOT AFFORD A FULL AND FAIR TRIAL**
v.	)	
DAVID MATTHEW HICKS	)	18 October 2004

1. Timeliness. This response is being filed within the timeline established by the Presiding Officer.

2. Prosecution Position on Defense Motion. The Defense motion should be denied.

3. Facts.

a. On September 11, 2001, the al Qaida terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks.

b. One week later, in response to these "acts of treacherous violence," Congress passed a joint resolution which states, in part, "that the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force ('the AUMF'), 115 Stat 224.

c. On October 7, 2001, the President ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.[1]

d. The President issued his Military Order of November 13, 2001 ("Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism").[2] In doing so, the President expressly relied on his authority as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the AUMF and Sections 821 and 836 of Title 10, United States Code.[3]

---

[1] http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html

[2] 66 Fed. Reg. 222 (November 16, 2001)

[3] Sections 821 and 836 are, respectively, Articles 21 and 36 of the Uniform Code of Military Justice ("UCMJ"). These sections provide, in relevant part:

Art. 21. Jurisdiction of courts-martial not exclusive

e. In his Order, the President determined that "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals."[4]

f. The President ordered, "Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed . . . ."[5] He directed the Secretary of Defense to "issue such orders and regulations . . . as may be necessary to carry out" this Order.[6]

g. Pursuant to this directive by the President, the Secretary of Defense on March 21, 2001, issued Department of Defense Military Commission Order (MCO) No. 1 establishing jurisdiction over persons (those subject to the President's Military Order and alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority)[7] and over offenses (violations of the laws of war and all other offenses triable by military commission).[8] The Secretary directed the Department of Defense General Counsel to "issue such instructions consistent with the President's Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions . . . ."[9]

h. The Accused was captured in Afghanistan on or about December 2001 during Operation Enduring Freedom, and on or about January 12, 2002, U. S. Forces transferred the Accused to Guantanamo Bay, Cuba for continued detention.

i. On February 7, 2002, the President of the United States issued a memorandum in which he determined that none of the provisions of the Geneva Conventions "apply to our conflict with Al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a high contracting party to Geneva." (President's memorandum dated February 7, 2002, attached)

j. The President determined that the Accused is subject to his Military Order on July

---

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

Art. 36. President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commission and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

[4] 66 Fed. Reg. 222 (November 16, 2001), Section 1(e).
[5] *Id.* at Section 2(a).
[6] *Id.* at Section 2(b).
[7] Militiary Commission Order (MCO) No. 1, para. 3(A).
[8] *Id.* at para. 3(B).
[9] *Id.* at para. 8(A).

3, 2003.

k. The Appointing Authority approved the charges in this case on June 9, 2004 and on June 25, 2004 referred the same to this military commission in accordance with commission orders and instructions. The case was thereafter docketed to be heard at the U.S. Naval base at Guantanamo Bay, Cuba.

l. On June 28, 2004, a plurality of the Supreme Court of the United States, in the case of *Hamdi v. Rumsfeld*, reaffirmed that "the capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, 'by universal agreement and practice', are 'important incident[s] of war.'" 124 S.Ct. 2633, 2639 (2004).

4. Legal Authority.

a. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003)

b. Madsen v. Kinsella, 343 U.S. 341 (1952)

c. United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F., 1999) (citing United States v. Ayala, 43 M.J. 296 (1995), and United States v. Stombaugh, 40 M.J. 208 (1994))

d. The President's Military Order of 13 November 2001, concerning the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism.

e. Military Commission Order No. 1, 32 C.F.R. § 9.3(a) (2003)

f. Military Commission Instruction No. 9, Review of Military Commission Proceedings, December 26, 2003, § 4C(1)a (hereinafter MCI No. 9)

g. 10 U.S.C §821

h. 10 U.S.C. §836

i. International Criminal Court, Statute, Article 69 (Available at http://www.un.org/law/icc/statute/romefra.htm)

j. International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, Rule 89 (Available at http//www.un.org/icty/legaldoc)

k. International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 89 (Available at www.ictr.org/english/rules)

5. Discussion.

Contrary to the Defense assertions, military commissions have been part of the system of laws of the United States since the founding of our country and are have been sanctioned as an appropriate forum for the prosecution of unlawful combatants for violations of the laws of war

and other offenses. The use of military commissions has been consistently approved by the United States Supreme Court and confirmed by Congress.

The Defense motion presents a somewhat interesting history of the development of the UCMJ over the last half-century, but addresses little relevant to the case in hand, that is, whether the procedures accorded by Commission Law are supported by legal precedent and whether they meet with standards of fundamental fairness. A review of precedent and of the procedures accorded reveal that the Defense assertions are completely unfounded. Many of the arguments made by the Defense in this motion are addressed in the Prosecution Response to Defense Objection to the Structure and Composition of the Panel, which we incorporate by reference and will avoid repeating. We will briefly touch upon the Defense's objections in this response.

a. **Military Commissions Accord the Accused Basic and Fundamental Rights.**

The Defense, in its motion, makes the claim that the Military Commission procedures deny the accused basic and fundamental rights recognized in both the civilian and military justice systems in the U.S. and the 1950 United Nations (UN) military commissions. Other than the reference to the use of a presiding officer instead of a judge, the Defense fails to give any specific examples of which fundamental rights are not provided or why the Accused is entitled to any procedures of the 1950 UN military commissions as a matter of law.

The President has broad authority to define the structure and procedures of military commissions. *Madsen v. Kinsella*, 343 U.S. 341 (1952). The structure and procedure he directs do not have to accord with a 1950 UN military commission. The real question is whether the present procedures afford the Accused with a fundamentally fair trial, which they do. Procedures accorded an accused under the Military Commission process match fundamental aspects of both the U.S. and international systems. A review of Military Commission Order No. 1, 32 C.F.R. § 9.3(a) (2003) (hereinafter MCO No. 1) shows that individuals subject to trial by the military commissions have all of the rights recognized as necessary for a full and fair process. Persons accused of crimes are assigned counsel at no cost or may choose another available defense counsel ("one or more Military Officers who are judge advocates of any United States armed force"). *Id.* § 9.4(c)(2). An accused person may also retain a civilian attorney of choice at no expense to the United States government, provided that such attorney meets certain criteria. *Id.* § 9.4(c)(2)(iii)(B). Once charged, the Accused will receive a copy of the charges "sufficiently in advance of trial to prepare a defense, be presumed innocent until proven guilty and be found not guilty unless the offense is proved beyond a reasonable doubt. *Id.* §§ 9.5(a), (b), (c). The prosecution must provide the defense "with access to evidence [it] intends to introduce at trial" and to "evidence known to the prosecution that tends to exculpate the Accused." *Id.* § 9.5(e). The Accused is permitted but not required to testify at trial, and the Commission may not draw an adverse inference from a decision not to testify. *Id.* § 9.5(f). The Accused "may obtain witnesses and documents for [his] defense, to the extent necessary and reasonably available as determined by the Presiding Officer," *id.* § 9.5(h), and may present evidence at trial and cross-examine prosecution witnesses, *id.* § 9.5(i). In addition, once a Commission's finding on a charge becomes final, "the Accused shall not again be tried" for that charge. *Id.* § 9.5(p).

Further, the military commissions are directed to provide for a "full and fair trial," to "[p]roceed impartially and expeditiously," and to "[h]old open proceedings except where

otherwise decided by the Appointing Authority or the Presiding Officer[.]" *Id.* §§ 9.6(b)(1),(2),(3).

Once a trial is completed (including sentencing in the event of a guilty verdict), the Presiding Officer must "transmit the authenticated record of trial to the Appointing Authority,"*id.* at § 9.6(h)(1), which "shall promptly perform an administrative review of the record of trial," *id.* § 9.6(h)(3). If the Appointing Authority determines that the commission proceedings are "administratively complete," the Appointing Authority must transmit the record of trial to the Review Panel, which consists of three military officers, at least one of whom has experience as a judge. *Id.* § 9.6(h)(4). The Review Panel must return the case to the Appointing Authority for further proceedings when a majority of that panel "has formed a definite and firm conviction that a material error of law occurred." *Id.* § 9.6(h)(4)(ii); Military Commission Instruction No. 9, Review of Military Commission Proceedings, December 26, 2003, § 4C(1) (hereinafter MCI No. 9).

On the other hand, if a majority of the panel finds no such error, it must forward the case to the Secretary with a written opinion recommending that (1) each finding of guilt "be approved, disapproved, or changed to a finding of Guilty to a lesser-included offense" and (2) the sentence imposed "be approved, mitigated, commuted, deferred, or suspended." MCI No. 9, § 4C(1)b. "An authenticated finding of Not Guilty," however, "shall not be changed to a finding of Guilty." MCO No. 1, 32 C.F.R. § 9.6(h)(2). The Secretary must review the trial record and the Review Panel's recommendation and "either return the case for further proceedings or . . . forward it to the President with a recommendation as to disposition," if the President has not designated the Secretary as the final decision maker. MCI No. 9, § 5. In the absence of such a designation, the President makes the final decision; if the Secretary of Defense has been designated, he may approve or disapprove the commission's findings or "change a finding of Guilty to a finding of Guilty to a lesser-included offense, [or] mitigate, commute, defer, or suspend the sentence imposed or any portion thereof."

All of the rights set forth above meet the requirements of fundamental fairness recognized in both national systems and international treaties.

b. **The role of the Presiding Officer is not determinative of whether the Accused will receive a fair trial conducted in accordance with the law.**

This again is nothing more than a speculative complaint by the Defense. The Defense provides no specific facts or law in support of its conclusion, other than that the United States does not use a presiding officer any longer for Courts-Martial. The point that the Defense ignores is that U.S. law authorizes the President to determine what rules of procedure and evidence should be implemented at military commissions. The recognition of the validity of this process by the Congress and U.S. Supreme Court is addressed fully in response to other Defense motions. The relevant facts are: the Presiding Officer is a judge advocate and former military judge, the members are senior military officers who have all, at one time or another, received training on military law and the Uniform Code of Military Justice, counsel for both parties are experienced judge advocates and, all of these individuals have been directed by the President and the Secretary of Defense to ensure that the proceedings are "full and fair." The role of the Presiding Officer is but one part of the process. It will require the diligent exercise of

their obligations by all of the individuals involved in the process – just as it does in any legal system – to ensure that fairness and justice prevail.

c. The Presiding Officer is not subject to unlawful command influence.

Once again, the Defense assertions are nothing more than speculation. To raise the issue of unlawful command influence in good faith, the Defense must (1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that unlawful command influence was the cause of the unfairness. United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F., 1999)(citing United States v. Ayala, 43 M.J. 296 (1995), and United States v. Stombaugh, 40 M.J. 208 (1994)). Prejudice is not presumed until the Defense produces evidence of proximate causation between the acts constituting unlawful command influence and the outcome of the trial. *Id.* The Defense has failed to produce any evidence that the Accused has suffered prejudice at the hands of the Presiding Officer.

d. The standard for admissibility at military commissions is appropriate and fair.

The Defense assertion that the standard for admissibility at the military commissions – evidence that would have probative value to a reasonable person – is "pathetically weak" and other such phrases is another unsupported and unwarranted allegation.

Research of the standards of admissibility in international criminal law or many national systems around the world reveals the fallacy of the Defense's position. The "probative value" standard is the basic evidentiary standard for admissibility at the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. It is also consistent with the standard of admissibility for civil law countries, such as France and Belgium. Moreover, the probative value standard is not inconsistent with common law standards of evidence, which provide that evidence must be relevant, *i.e.*, reliable and material. The bald assertion by the Defense that the impact of the probative value standard will be the introduction of incompetent and unreliable evidence is unsupported by way of example, citation, or proof of any form. The "fairness" of the military commission process will be determined by the application of the recognized rights and standards contained in the President's order, MCO No. 1, and the Military Commission Instructions.

e. The procedures of the military commissions are Congressionally sanctioned.

As with the other unsupported assertions made by the Defence in this motion, the statement that the "archaic and discredited" procedures of the military commissions are not Congressionally sanctioned is wrong.

The jurisdiction of and procedures governing military commissions – which have tried *unlawful belligerents* since the earliest days of the United States – have been sanctioned by Congress. With the codification of the UCMJ in Title 10 of the U.S. Code, Congress specifically preserved the jurisdiction and procedures for military commissions in Article 21 as they have historically been recognized. As the Supreme Court recognized in *Madsen v. Kinsella*, 343 U.S. 341 (1952), a case decided after the UCMJ's enactment:

> Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our common law war courts. They have taken many forms and borne many names. *Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth.* * * *
>
> With this practice before them, the Committees of both Houses of Congress recommended the reenactment of Article of War 15 as Article 21 of the new code. They said, "This article preserves existing Army and Air Force law which gives concurrent jurisdiction to military tribunals other than courts martial."

Madsen, 343 U.S. at 346-347, 351 n.17 (emphasis added).

By enacting Articles 21 and 36, Congress made it clear that it wished to preserve the historical precedent that "the[ ] procedure" for military commissions has not been "prescribed by statute"; rather, "[i]t has been adapted in each instance to the need that called it forth." Madsen, 343 U.S. at 346-347. If Congress intended to *depart* from that longstanding practice by subjecting the commissions to a rigid and uniform set of procedures—tying the President's hands during times of war in the process—it surely would have done so more plainly. *See id*. at 346 n.9 ("The commission is simply an instrumentality for the more efficient execution of * * * the war power vested in the President as Commander-in-chief in war.
* * * In general, [Congress] has left it to the President, and the military commanders representing him, to employ the commission, as occasion may require[.]" (quoting William Winthrop, *Military Law and Precedents* 831 (2d ed. 1920))

Both the Supreme Court and Congress have had numerous opportunities to limit the jurisdiction of commissions, restrict the President's discretion or require specific rules and procedures, but have not, rather they have confirmed the President's authority and discretion. Congress has amended the UCMJ several times, and each time has confirmed, in Article 36, the President's authority and discretion to determine the rules of procedure and evidence applicable to military commissions.

6. Attached File. None.

7. Oral Argument. If Defense is granted oral argument, Prosecution requests the opportunity to respond.

8. Witnesses/Evidence. The Prosecution does not foresee the need to present any witnesses or further evidence in support of this motion.

9. Additional Information. None.

//Original Signed//

XXXX
Lieutenant Colonel, U.S. Marine Corps
Prosecutor